1958

Eva M. Rees Scott v. Molen N. Rees : Brief of Appellant

Utah Supreme Court

Case No. 8968

IN THE SUPREME COURT
of the
STATE OF UTAH

EVA M. REES SCOTT,
Plaintiff and Appellant,

—vs.—

MOLEN N. REES,
Defendant and Respondent.

BRIEF OF APPELLANT

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STATEMENT OF FACTS

On March 17, 1958, the District Court of Salt Lake County entered a Decree of Divorce in the above entitled case, pursuant to which defendant was awarded a decree of divorce and a division of the property of the parties was made (R-2).

This decree awarded the care, custody and control of the two minor children of the parties to plaintiff during the months of September through June, inclusive, of each year and upon alternate Thanksgiving and

Christmas holidays, and to the defendant during the months of July and August of each year and during the Christmas and Thanksgiving holidays of every other year. Defendant was ordered to pay the sum of $250.00 per month for the support of the children during the periods of plaintiff's custody (R-2, 3).

The children are a girl, who is now six years old, and a boy, who is now two years old (R-20).

The Decree specifically provided that in the event plaintiff resided with the minor children outside the jurisdiction of the court, the plaintiff was to pay the transportation of the children to and from the place of abode of defendant for his period of custody entitlement (R-2, 3). It further provided that defendant would have the privilege of reasonable visitation with the children while they were in plaintiff's custody but his transportation in visiting the children would be at his own expense (R-3). The Decree further provided that plaintiff could not remove the children from the jurisdiction of the court without first applying to the court for an order permitting the removal (R-3).

Pursuant to the decree, plaintiff had custody of the children until July 1, 1958 and defendant had their custody from July 1st to September 1, 1958. Since September 1, 1958 the children have been in plaintiff's custody (R-32, 34, 35).

On June 21, 1958 the plaintiff married Dr. Edward B. Scott, a resident of North Hollywood, California (R-

17, 18; Ex. P-1). Since the marriage Appellant has established a home in North Hollywood, California, with her husband, which is located in a good neighborhood and in good surroundings for the rearing of children (R-8).

On the 29th of August, 1958, plaintiff served on defendant and his counsel and filed a motion in accordance with the decree of divorce for permission to remove the children to her residence in the state of California during the period from September through June of each year. This motion was accompanied by plaintiff's affidavit (R-5 to 8). Defendant filed an affidavit in opposition to this motion and the matter was heard September 9, 1958.

The evidence relative to the home and circumstances of plaintiff and her husband is uncontradicted. It shows that the home established by plaintiff and her husband in California is located in close proximity to good schools and church facilities (Exhs. P-2 to P-8; R-18, 19, 20). The home has a bedroom for each of the children, has a large yard in which the children can play and a patio-barbecue area (R-18). Plaintiff and her husband have redecorated the bedroom for the little girl and Dr. Scott constructed a sandbox area and acquired toys for the children in anticipation of their coming to live with them (R-21).

Plaintiff's husband desires that the children come to reside with plaintiff and him during the period of plaintiff's custody entitlement (R-21) and he has a great amount of affection for the children (R-8). Plaintiff

testified that her husband continually talks about the children and what will be in their best interests when they reside with plaintiff and him (R-21).

The uncontroverted evidence at the hearing further shows that were it not for her marriage to Dr. Scott, plaintiff would be required to seek employment to provide for herself, but by reason of her marriage to Dr. Scott this is not necessary (R-25,30). Dr. Scott has a net income of approximately $2,000.00 per month in his practice as an anesthesiologist on the staff of the Children's Hospital in Los Angeles, California (R-23, R-21). By reason of this situation plaintiff will be able to devote her full attention to providing the chidren with a mother's loving care and affection and in making a good environment for them (R-25; R-8).

Prior to establishing residence in California, Dr. Scott had been engaged in the practice of medicine in Salt Lake City, Utah. Before the marriage of Plaintiff and Dr. Scott, he had established his residence in California. By moving to California he achieved certain very definite advantages for himself in his profession. Among these were the fact that he could obtain a shorter preceptorship in California, he has available to him the facilities for intensive research in the field of hypothermy, which is the use of freezing as an anesthesia for operations, and has the opportunity of doing a large amount of teaching work in the hospital (R-24). In addition to these factors, there was considerable uncertainty as to the future of anesthesiologists in Utah hospitals at the time he left

here. This arose out of a movement on the part of certain hospitals in the region to require anesthesiologists to work on a salary basis in the hospitals rather than permitting them to have a private practice of medicine such as other doctors have. Dr. Scott did not want to work on such a salary arrangement but rather was interested only in engaging in the private practice of his specialty (R-75).

Following the hearing the Court entered an order denying plaintiff's motion, stating that "the remarriage of plaintiff presents a possible unstable home situation and time is needed in which to determine whether or not the home of plaintiff and her new husband is suitable for rearing the minor children of the parties." The order further provided that plaintiff would be permitted to re-apply for permission to remove the children from the State of Utah, at any time after January 1, 1959 but made the granting of such permission expressly conditional upon the testimony of plaintiff's new husband being offered at that time in order that the court might determine the fitness of the home for the children.

This appeal is taken from that order.

STATEMENT OF POINTS RELIED ON

POINT ONE.

THE ORDER OF THE TRIAL COURT UNDER THE EVIDENCE ADDUCED AT THE HEARING OF PLAINTIFF'S MOTION TO REMOVE HER CHILDREN TO CALIFORNIA CONSTITUTES AN ABUSE OF THE TRIAL COURT'S DISCRETION.

POINT TWO

THE ORDER OF THE TRIAL COURT DENYING PLAINTIFF'S MOTION TO REMOVE HER CHILDREN TO THE STATE OF CALIFORNIA DURING THE PERIOD FROM SEPTEMBER THROUGH JUNE OF EACH YEAR, IS CONTRARY TO LAW.

POINT THREE

THE ORDER OF THE TRIAL COURT AND THE FINDINGS CONTAINED THEREIN ARE NOT SUPPORTED BY THE EVIDENCE ADDUCED AT THE HEARING OF PLAINTIFF'S MOTION.

ARGUMENT

POINT ONE.

THE ORDER OF THE TRIAL COURT UNDER THE EVIDENCE ADDUCED AT THE HEARING OF PLAINTIFF'S MOTION TO REMOVE HER CHILDREN TO CALIFORNIA CONSTITUTES AN ABUSE OF THE TRIAL COURT'S DISCRETION.

The Utah statute governing the role of the court in connection with supplemental proceedings following divorce decrees is section 30-3-5, Utah Code Annotated, 1953. This provides:

> " * * * Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper."

Within the framework of this statute, the Courts have construed the function of the court in connection with custody matters to be that of determining what is

in the best interests and welfare of the minor children, and have concluded that this is a matter which rests largely in the sound discretion of the trial court. It has been said that the orders of the trial court will not be upset unless there is an abuse of discretion by the trial court.

Applying these rules to the instant case, it is submitted that by no stretch of the imagination could the trial court's order be said to be reasonable and proper. Rather it represents a grevious departure from realities, disregarding the effects it will have, resulting in the creation of a very brutal situation.

Analysis of the order shows that it does two things: First, it leaves the custody of the children who are of tender ages with their mother, but for the present requires that she keep them in Utah where she does not have a home. Secondly, looking to the future, it requires that plaintiff and her husband conduct their lives together so that some additional showing can be made that their home life is not unstable, after which impliedly plaintiff may return to California with her children to to be with her husband.

By examing how this order works out in practice, it becomes manifest that the first part of the order prevents plaintiff from meeting the requirements of the second portion of the order. One can readily see how the order itself places appellant in a grievous dilemma. She must either stay with her children in Utah and establish a home apart from her husband, or desert her children

and go home to her husband in California. If she follows the former course, she will not be in position to offer any additional evidence that she has a stable home situation with her husband since she will not have lived with him. If she follows the latter course of rejoining her husband, it would rightly be said that she has more interest in her life with her husband than in her children's welfare.

Can it conceivably be said that an order which creates such a situation is "reasonable and proper?" Can it be said that placing the children where there is no home for them and denying their going where there is a home for them is in their best interests? When a court indulges in mere conjecture that there is a "*possible* unstable home situation," can it be said that this is the exercise of sound discretion?

To say the least, the trial court's order is not conducive to the establishment of a "stable home situation" if there were not one at the previous hearing. If plaintiff is motivated primarily by mother love and remains with her children, as she has done, how stable will the home situation appear after January 1, 1959 (when plaintiff is permitted to reapply for removal) when the evidence is adduced that from the time of the last order she has not lived in the same house with her husband? The trial court's order itself prevents the maintenance of a stable home situation, and on the contrary is disrupting the home situation heretofore established.

The effect of this order on the children can only be harmful. The frustrations of their mother being forced by the court order to live away from her home can only be reflected in the children's environment. The instability of the children being in a temporary housing situation rather than becoming established in a permanent home is certainly not in their best interest and welfare.

Divorces of couples with minor children cannot help but have a deleterious effect upon the children. Unfortunately there does not appear to be any solution which would be completely satisfactory in insulating children from the unhappiness of their parents. When a divorce becomes an accomplished fact, the role of a court should be to make the readjustment which the children must go through as easy as possible for them. Its province is certainly not that of doing anything to further disrupt the situation such as the trial court has done here.

It is submitted that given the factual situation of a woman who has married a man whose professional career dictates his residing outside the state of Utah, and who has established a home in which the children can be reared with their mother being able to devote her full attention to providing them with a mother's loving care, the trial court has needlessly injected a decidedly disrupting influence. The trial court's order will be a continual source of disruption so long as it is in effect, and cannot, by its very terms, result in termination of this dilemma.

As will be pointed out subsequently in this brief,

the trial court made its finding of "a possible unstable home situation" without any evidence whatsoever of anything but a suitable home situation. The court has withdrawn itself entirely from the evidence before it in arriving at this finding. If such a course were permissible, it is altogether possible that the home situation of every person in the nation could be declared to represent "a *possible* unstable home situation." Certainly it is possible to think of something in any person's background, personality, or behavior which, when equated with similar or dissimilar characteristics in their spouse, could form a foundation upon which we might conjecture that their marriage might present a "possible unstable home situation." For the court to permit itself to indulge in such conjecture, and to use this as the basis for an order such as here is involved is certainly a most flagrant abuse of discretion.

POINT TWO

THE ORDER OF THE TRIAL COURT DENYING PLAINTIFF'S MOTION TO REMOVE HER CHILDREN TO THE STATE OF CALIFORNIA DURING THE PERIOD FROM SEPTEMBER THROUGH JUNE OF EACH YEAR, IS CONTRARY TO LAW.

The decree of divorce entered in March, 1958, awarded the minor children to plaintiff's custody for the period from September through June, inclusive, of each year. This decree was not appealed from by either party and therefore is res adjudicata of matters occuring prior to the hearing of the divorce action. Implicit in the award of the children's custody to plaintiff is the fact

that the court found nothing in plaintiff's demeanor or conduct as relates to the children which would make her an unfit person to have their custody. In view of the ages of the children, the girl six years and the boy two years, this decision of the trial court was in keeping with this court's ruling in the case of Hulse vs Hulse, (1947) 176 Pac 2d 875, where it was said:

> "This court has previously held in construing 40-3-5 of our statutes, that even in a contested case where the husband is awarded the divorce, if the children of the parties are of tender age, they will ordinarily be awarded to the custody of their mother, with provision being made in the decree for the father to support those children."

See also: Anderson vs. Anderson (1946), 110 Utah 300, 172 Pac 2d 132; Holm vs Holm, 44 Utah 242, 139 Pac. 937.

By its order of September 25, 1958, the trial court again impliedly finds that the best interests of the children will be served by being with their mother.

Under these circumstances, the sole question then is whether or not the trial court was correct in ruling that the children should not be removed from the state of Utah while they are in appellant's custody.

This court in the case of Griffith vs. Griffith, 18 Utah 98, 55 Pac. 84, adopted the rule that where the circumstances justify it, the children of divorced couples may be removed from the state. In that case the custody of the children had been awarded to the mother. The mother's parents resided in Iowa. The trial court had

ruled that the children could not be removed from Utah. In reversing the trial court's order forbidding the removal, the court says:

> "The defendant assigns as error so much of the findings and decree as forbids the defendant from taking her son beyond the limits of this state. It appears from the evidence that defendant's parents reside in the State of Iowa, where she lived until recently. Her welfare and the best interests of the child might demand a return to her parents and friends there, though outside of the state. We are of the opinion that so much of the findings, conclusions of law, and the decree as forbids her from taking her son beyond the state without the consent of the plaintiff, is erroneous."

The case of Kirby vs Kirby, 126 Wash. 530, 219 Pac. 27, involves a factual situation very close to that involved here. An application to modify a decree covering custody of a child was made to permit the mother to move with the child to New York. The decree gave custody to the mother at all times during the school year and to the father during the summer vacations and one week at Christmas time. The decree provided that the mother could not remove the child from the jurisdiction without the consent of the father or the order of the court. The mother had remarried and her husband had a better job opportunity in New York. The court reversed the trial court's order refusing permission to remove the child from Washington, saying:

> "In cases of this kind, the matter of first importance is the welfare of the child. If the stepfather can improve his business connections and

> associations, he treating the child as though it were his own, a better business connection cannot help but have a resultant beneficial effect insofar as the child is concerned. The respondent has not married since the decree of divorce, but maintains a home with his two sisters, young women, both of whom are employed a greater portion of the time. If the decree is not modified permitting the child to be taken to New York, it would result in Mr. McCluske's remaining in Seattle when better business connections would dictate his going to New York, or that he would be required to maintain his family in the State of Washington, while he resided in New York. This would be, in effect, breaking up the family. Courts have not hesitated to permit a parent, to whom a child has been awarded in a divorce action, to take it to another state, or even to a foreign country, when the best interests of the child would be promoted thereby. (Citing cases)"

This case was followed in the cases of Jeschke vs. Jeschke, (1943) 16 Wash. 2d 617, 134 Pac. 2d 464, and Goade vs. Goade (1944) Wash., 145 Pac. 2d 886. A similar ruling is to be found in Commonwealth Ex Rel Balla vs Wreski, (1949) 165 Pa. Super 6, 67 Atl. 2d 595; Wallace vs. Wallace (1910) 26 S. Dak. 229, 128 N. W. 143; Lane v. Lane (1945) Mo. App., 186 S.W. 2d 47; Mattox vs. Mattox (1929) 129 Okla. 301; 264 Pac. 898; Santo vs. Santo, (1949) Colorado, 206 Pac. 2d 341.

In examining the instant case in the light of these rulings, certain salient points stand out. Without her marriage to Dr. Scott, appellant would be required to obtain employment to provide for her support. As it is, she

can now devote her full time and attention to providing the children with a good home and in giving them a mother's loving care and attention. By reason of her marriage to Dr. Scott, a man who is able to provide adequately for his family's needs, appellant can provide the children with better facilities than she could had she not married and was having to provide for herself. The home into which the children will be placed is a nice one in a good neighborhood which will provide the children with very good surroundings. These factors make it very decidedly to the best interests of the children that appellant has married Dr. Scott. To let state lines interfere with this situation is rather pointless.

Dr. Scott has very definite advantages in his professional connections in California which dictate that he should reside there. For the court by its order to force a breakup of the home which appellant and her husband have established for themselves and the children is erroneous and contrary to the decided cases on the point.

The trial court has overlooked the March 17, 1958, decree in making its ruling. It was clearly contemplated in that decree that appellant would establish a residence outside of Utah. All of the mechanical and other problems incident to having appellant reside outside the state, such as getting children to and from the state, and defendant's being able to visit the children, were carefully covered in that decree. It is submitted that the requirement of obtaining the court's permission for removal was inserted into that order for the sole reason

that the court could determine that appellant would make adequate arrangements for the care of the children in establishing her residence outside the state. This she has certainly done.

Nor is this a situation where the removal from the state would deprive respondent from having the companionship of his children and being able to exert his influence and guidance over them. He has custody during the summer months when the children are not in school, and at times when he can spend more time with them. In view of the difficulties which have occurred between plaintiff and defendant in connection with the visitation rights while the children have been in appellant's custody, it is submitted that it will certainly be less disturbing on the children that they do not experience fights and squabbles between their parents such as they have been subjected to since the entry of the March decree.

If the trial court's order is affirmed, it would require appellant to establish quarters for the children in Utah for ten months a year, and spend ten months of a year away from her home in California. From this nothing is gained that would not be better accomplished by the children's going to California with her where she can make a permanent home for them for those ten months a year and more adequately provide for them.

POINT THREE

THE ORDER OF THE TRIAL COURT AND THE FINDINGS CONTAINED THEREIN ARE NOT SUPPORTED BY THE EVIDENCE ADDUCED AT THE HEARING OF PLAINTIFF'S MOTION.

In its order the trial court finds that "the remarriage of plaintiff presents a possible unstable home situation and time is needed in which to determine whether or not the home of plaintiff and her new husband is suitable for rearing the minor children of the parties hereto."

This finding contained in the order is not supported in any manner by the evidence presented to the Court. There is not a scintilla of evidence to support any such finding. On the contrary the entire evidence in the record relative to the home and home life of appellant and her husband reflects the very best of circumstances.

The court after finding "a possible unstable home situation" without any evidence to support it, then proceeds from this premise to conclude that more time is needed to determine whether or not the home of plaintiff and Dr. Scott is suitable for rearing the children, following which the Court apparently concludes they should then be removed to California.

It is submitted that this premise unsupported by evidence of any kind is the basis upon which the court has concluded the children should be kept by appellant in the State of Utah for the present. Obviously the Court concluded that the children should remain in appellant's custody, since that is its order. The only basis upon which it could have concluded that this custody should not be in California with her husband was that expressed by this unsupported finding.

It is submitted that the only element of instability

which is to be found in the case at bar is that which is the result of the trial court's order itself. The frustration of a mother and wife torn between being with her children on the one hand and with her husband on the other, and having no cause for this situation except that a Court has decreed it shall be so, would certainly add a substantial measure of instability to the most stable of homes.

Further the Court in its Order requires that the testimony of appellant's husband should be offered as a condition to the granting of permission to remove in the future. It is appellant's contention that the husband's testimony is not mandatory in a hearing such as this. The case of Aiken vs. Aiken, (1947) 120 Montana 344, 185 Pac. 2d 294, was a case quite similar to the case at bar, where the mother, to whom custody of a minor child had been awarded remarried a man in Colorado and requested permision to remove the child from Montana to Colorado. The trial court granted the permission, and on appeal the father had contended that since the new husband's testimony had not been offered, the trial court's ruling was error. The Court in that case said:

> "Here defendant is obliged to make her residence with that of her husband in Denver, Colorado. The court did not abuse its discretion in authorizing her to take Russell with her. * * *
>
> "The legal custody is with defendant and not with her husband, and if her husband does not properly treat the child, that might furnish grounds for changing the custody in the future,

> but we think his silence cannot prevent the mother who has the custody, from taking the child to the state where she is obliged to live."

Appellant testified that Dr. Scott has a great amount of affection for the children and desires to have them come to California to reside with appellant and him. This evidence stands unrebutted, and it is not the Court's prerogative to specify how evidence shall be presented to it nor what witness shall testify before it.

In conclusion, it is appellant's contention that the trial court's order in denying appellant's motion to remove the children from Utah to California during the period of her custody entitlement under the March 17, 1958 decree represents a gross abuse of discretion and of itself creates a brutally impossible situation. The trial court by both of its orders has found that the children should be with appellant during the period from September through June of each year, and that such is in their best interests. The cases which have been decided involving the removal of children from one state to another have held that state lines can be no barrier in custody matters where the best interests of the children will be subserved thereby. The Court has ignored the evidence before it in determining that there is "a possible unstable home situation", and has in fact permitted itself to indulge in mere conjecture, when the evidence before it was completely contrary to such a finding. In view of the holding of the Court that the custody of the children should remain with appellant, it becomes apparent that they can be better cared for in California, where plain-

tiff and her husband have a good home for them in good surroundings, than in the State of Utah where appellant has no home, where any arrangements for the children would be makeshift, and where plaintiff will be separated from her husband.

It is respectively submitted that the order of the trial court should be reversed and the appellant's motion to remove the children from Utah to California for the period of appellant's custody under the decree of divorce of March 17, 1958, should be granted.

Respectfully submitted,

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